

MANDATE

14-635
United States v. Ojo

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

SUMMARY ORDER

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At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 19th day of November, two thousand fifteen.

PRESENT: DENNIS JACOBS,
DEBRA ANN LIVINGSTON,
CHRISTOPHER F. DRONEY,
Circuit Judges.

- - - - -X
UNITED STATES OF AMERICA,
Appellee,

-v.-

14-635

DAVID OLUKAYODE OJO,
Defendant-Appellant.

- - - - -X
FOR APPELLANT: BRUCE ROBERT BRYAN, BRYAN LAW
FIRM, Syracuse, New York.

FOR APPELLEES: MARGARET E. GANDY (with Emily
Berger & Douglas M. Pravda on
the brief) for Kelly T. Currie,
Acting United States Attorney

1 for the Eastern District of New
2 York, Brooklyn, New York.
3

4 Appeal from a judgment of the United States District
5 Court for the Eastern District of New York (Ross, J.).
6

7 **UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED**
8 **AND DECREED** that the judgment of the district court be
9 **AFFIRMED.**
10

11 David Olukayode Ojo appeals from the judgment of the
12 United States District Court for the Eastern District of New
13 York (Ross, J.), convicting him and sentencing him chiefly
14 to two concurrent terms of 37 months' imprisonment and three
15 years of supervised release for conspiracy to commit wire
16 fraud, see 18 U.S.C. §§ 1343, 1349, and conspiracy to
17 knowingly possess with intent to use unlawfully five false
18 identification documents. See 18 U.S.C. §§ 1028(a)(3),
19 (b)(2)(B), (c)(3)(A), c(3)(B), (f). We assume the parties'
20 familiarity with the underlying facts, the procedural
21 history, and the issues presented for review.
22

23 1. Ojo challenges the sufficiency of the evidence on
24 both convictions. "A defendant challenging the sufficiency
25 of the evidence bears a heavy burden, because the reviewing
26 court is required to draw all permissible inferences in
27 favor of the government and resolve all issues of
28 credibility in favor of the jury verdict." United States v.
29 Kozeny, 667 F.3d 122, 139 (2d Cir. 2011). "The traditional
30 deference accorded to a jury's verdict 'is especially
31 important when reviewing a conviction for conspiracy . . .
32 because a conspiracy by its very nature is a secretive
33 operation, and it is a rare case where all aspects of a
34 conspiracy can be laid bare in court with the precision of a
35 surgeon's scalpel.'" United States v. Jackson, 335 F.3d
36 170, 180 (2d Cir. 2003) (quoting United States v. Pitre, 960
37 F.2d 1112, 1121 (2d Cir. 1992)).
38

39 "[T]he conspiratorial agreement itself may be
40 established by proof of a tacit understanding among the
41 participants, rather than by proof of an explicit agreement
42" United States v. Desimone, 119 F.3d 217, 223 (2d
43 Cir. 1997). Drawing all inferences in favor of the
44 government, the evidence adduced at trial was sufficient to
45 show that Ojo had a tacit understanding with his co-
46 conspirators and engaged in "purposeful behavior aimed at
47 furthering the goals of the conspiracy" for both wire fraud

1 and knowing possession with intent to use unlawfully five
2 false identification documents. Id.

3
4 **2.** As to the conspiracy to knowingly possess with
5 intent to use unlawfully five false identification documents
6 offense, Ojo contends that the jury instruction was
7 improper. The government offered alternative theories of
8 liability: (1) that Ojo intended to use identification
9 documents unlawfully to participate in a conspiracy to
10 commit wire fraud; and (2) that Ojo intended to use the
11 identification documents unlawfully to violate New York
12 state law. If the jury found Ojo guilty on Count One for
13 conspiracy to commit wire fraud, as it did, the government's
14 first theory of liability would be met. The district court
15 instructed the jury on both theories. Ojo's argument
16 attacks the instruction given on the second theory.
17 However, because the instructions were proper and ample
18 evidence supports the first theory--conspiracy to commit
19 wire fraud--Ojo's challenge must be rejected. "When the
20 jury is properly instructed on two alternative theories of
21 liability, as here, we must affirm when the evidence is
22 sufficient under either of the theories." United States v.
23 Masotto, 73 F.3d 1233, 1241 (2d Cir. 1996).

24
25 **3.** Ojo challenges the denial of his motion to suppress
26 evidence seized during the stop of his car because the stop
27 was pretextual and because Ojo's consent was involuntary.
28 But the subjective motivation of the officers who made the
29 stop is irrelevant; arguments "that the constitutional
30 reasonableness of traffic stops depends on the actual
31 motivations of the individual officers involved" are
32 "foreclose[d]." Whren v. United States, 517 U.S. 806, 813
33 (1996); see also United States v. Dhinsa, 171 F.3d 721, 724-
34 25 (2d Cir. 1999) ("In other words, an officer's use of a
35 traffic violation as a pretext to stop a car in order to
36 obtain evidence for some more serious crime is of no
37 constitutional significance.").

38
39 "It is . . . well settled that one of the specifically
40 established exceptions to the requirements of both a warrant
41 and probable cause is a search that is conducted pursuant to
42 consent." Schneckloth v. Bustamonte, 412 U.S. 218, 219
43 (1973). "In considering a challenge to a district court
44 finding of consent, we are obliged to view the evidence in
45 the light most favorable to the government. We will not
46 reverse a finding of voluntary consent except for clear
47 error." United States v. Snype, 441 F.3d 119, 131 (2d Cir.

1 2006) (internal citation omitted). The district court's
2 determination that Ojo voluntarily consented to a search of
3 his car was not clearly erroneous given: (1) Ojo's signature
4 on a handwritten consent form for a search of his car,
5 including its interior, trunk, and glove box; (2) testimony
6 that Ojo also gave oral consent; and (3) further testimony
7 that, after the search was completed, Ojo signed a standard
8 FBI "consent to search" form confirming his prior consent.
9

10 4. Ojo contends that the district court's decision to
11 dismiss the indictment without prejudice based on a Speedy
12 Trial Act violation was erroneous. A proper and principled
13 consideration of the relevant factors shows otherwise.
14

15 "The determination of whether to dismiss an indictment
16 with or without prejudice is committed to the discretion of
17 the district court, and we will reverse such a determination
18 only upon a finding that the district court abused its
19 discretion." United States v. Wilson, 11 F.3d 346, 352 (2d
20 Cir. 1993) (internal citation omitted). Factors considered
21 in this determination are: (1) the seriousness of the
22 offense; (2) the facts and circumstances of the case which
23 led to the dismissal; (3) the impact of a re-prosecution on
24 the administration of the Speedy Trial Act and the
25 administration of justice; and (4) prejudice to the
26 defendant. See id. "Where the crime charged is serious,
27 the sanction of dismissal with prejudice should ordinarily
28 be imposed only for serious delay." United States v.
29 Simmons, 786 F.2d 479, 485 (2d Cir. 1986).
30

31 Ojo's offense was unquestionably serious: it was
32 punishable by a prison term of up to 20 years, and the
33 evidence established a loss of approximately \$80,000
34 suffered by more than 30 victims. The nonviolent nature of
35 this offense cannot overcome these indicia of seriousness.
36 See United States v. Kiszewski, 877 F.2d 210, 214 (2d Cir.
37 1989) (noting that perjury was a serious crime "since false
38 testimony strikes at the heart of administering the criminal
39 law"). Moreover, the length of the speedy trial violation
40 was only one day, a delay that does not amount to "serious
41 delay." Simmons, 786 F.2d at 485.
42

43 As for the facts and circumstances leading to
44 dismissal, the government explained that the one-day delay
45 was likely a byproduct of the prosecutor counting the 30
46 days from the date of the arraignment rather than the date
47 of the arrest. Nothing in the record suggests bad faith or

1 misconduct on the part of the government. For this reason,
2 the interests of justice weighed in favor of dismissal
3 without prejudice. See Simmons, 786 F.2d at 486 ("[W]here
4 the violation of the Act was unintentional and the resulting
5 delay not overly long, and where appellant has not presented
6 evidence of prejudice, we do not believe that the
7 administration of justice would be adversely affected by
8 reprosecution.").

9
10 Ojo can point to no prejudice he suffered as a result
11 of the one-day delay. While prejudice is presumed to flow
12 from any delay, this factor requires an incremental showing
13 of actual prejudice; otherwise, this factor would always be
14 satisfied and would not be a variable. See United States v.
15 Wells, 893 F.2d 535, 540 (2d Cir. 1990) ("We detect nothing
16 in the record to indicate that the Government's delay caused
17 any prejudice") (emphasis added); United States v.
18 Hernandez, 863 F.2d 239, 244 (2d Cir. 1988) ("[S]hort delays
19 of the kind present here do not become 'serious' violations
20 of the Speedy Trial Act unless there is some resulting
21 prejudice to the defendant."). A scrupulous application of
22 the applicable standards and rules necessitates the
23 conclusion that the district court did not abuse its
24 discretion in dismissing the indictment without prejudice.
25

26 5. Ojo's claims that perjured testimony was presented
27 before the grand jury, during the suppression hearing, and
28 at trial are meritless and lack record support. Nor was
29 there a double jeopardy violation because Ojo successfully
30 withdrew his guilty plea after initially pleading guilty.
31 See United States v. Olmeda, 461 F.3d 271, 279 n.7 (2d Cir.
32 2006) ("[J]eopardy is not deemed to attach at the time of a
33 guilty plea, for example, where a defendant subsequently
34 withdraws his plea.").

35
36 For the foregoing reasons, and finding no merit in
37 Ojo's other arguments, we hereby **AFFIRM** the judgment of the
38 district court.
39

40 FOR THE COURT:
41 CATHERINE O'HAGAN WOLFE, CLERK
42
43

A True Copy

Catherine O'Hagan Wolfe, Clerk

United States Court of Appeals, Second Circuit

Catherine O'Hagan Wolfe

Catherine O'Hagan Wolfe